Supreme Court, U.S.
FILED
JAN 14 1972
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-924

SEARS, ROEBUCK AND CO., TERMINAL FREIGHT COOPERATIVE ASSOCIATION AND TERMINAL FREIGHT HANDLING COMPANY,

Petitioners,

vs.

JOSEPH H. SOLIEN, REGIONAL DIRECTOR OF THE FOURTEENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD,

Respondent.

BRIEF AMICUS CURIAE ON BEHALF OF THE PHILLIPS PLUMBING AND HEATING COMPANY IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.*

RALPH A. MORRIS,
SEYFARTH, SHAW, FAIRWEATHER & GERALDSON,
111 West Jackson Boulevard,
Chicago, Illinois,
Attorney for the Phillips Plumbing and Heating Company.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

INDEX.

	PAGE
I. Interest of the Amicus Curiae	2
II. Reasons for Granting the Writ of Certiorari	3
A. The Problems Raised in the Administration of Section 10(1) of the Act Are Exemplified by This Case, and Should Be Ruled Upon by This Court to Effectuate the Purposes of the Act	3
B. The Present Case Arises in the Contexts of Other Significant Issues Which This Court Should Also Consider	4
Conclusion	4

AUTHORITY CITED.

Miscellaneous.

Thirty-Third Annual Report of the National Labor Relations Board (1968), Table 18, pp. 238-239	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. .....

SEARS, ROEBUCK AND CO., TERMINAL FREIGHT COOPERATIVE ASSOCIATION AND TERMINAL FREIGHT HANDLING COMPANY,

Petitioners,

vs.

JOSEPH H. SOLIEN, REGIONAL DIRECTOR OF THE FOURTEENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD,

Respondent.

BRIEF AMICUS CURIAE ON BEHALF OF THE PHILLIPS PLUMBING AND HEATING COMPANY IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.*

*Pursuant to Rule 42(1) of the Rules of this Court, oral consent has been received from all parties hereto to the filing of this brief; *amicus curiae* and written consents are being lodged with the Clerk of the Court.

I.

INTEREST OF THE AMICUS CURIAE.

This brief is filed on behalf of Phillips Plumbing and Heating Company ("Phillips"), a small employer located in Davenport, Iowa. Phillips was recently subjected to a devastating secondary boycott and, as a result, filed unfair labor practice charges with the National Labor Relations Board in order to seek the protection afforded by Section 10(1) of the National Labor Relations Act.[1]

As in the instant case, the Regional Director of the Board found that there was reasonable cause to believe that Phillips' charges were true. Nevertheless, Phillips, like Terminal and Sears in the present case, was not afforded the relief contemplated by Section 10(1). In addition, the Board negotiated a settlement agreement without the charging party's participation. The secondary boycott was continued at Phillips and no injunctive relief was sought. Phillips, as a result, lost valuable contracts in business which it may never be possible to recoup.

Counsel for Phillips is a large national law firm located in Chicago, Illinois representing many employers, both small and large, throughout the United States. The above experience of Phillips, in Counsel's experience, is by no means unique. Rather, it is part of a pervasive practice followed uniformly by the Board. Those cases in which

1. *Local Union No. 562, Affiliated with the U. A. of Journeyman & Apprentices of the U. S. & Canada, AFL-CIO (George Koch Sons, Inc.)*, N. L. R. B. Case No. 17-CC-467.

the Board fails to carry out the statutory command are the rule rather than the exception in Section 10(1) proceedings.[2]

II.

REASONS FOR GRANTING THE WRIT OF CERTIORARI.

A. The Problems Raised in the Administration of Section 10(1) of the Act Are Exemplified by This Case, and Should Be Ruled Upon by This Court to Effectuate the Purposes of the Act.

As noted above, the experience of Terminal and Sears here is typical of a recurrent pattern utilized by the Board in its administration of the Act. The resultant harm experienced by employers, whose only effective protection from secondary boycotts is Section 10(1),[3] is widespread and substantial. Since most charging parties are small employers who can afford neither prolonged picketing or expensive litigation,[4] this case is an appropriate vehicle for this Court to now resolve the present controversy.

---

2. As the Court below found, Board Regional Directors seek 10(1) injunctive relief in only *one-quarter* of all cases where there has been a finding of reasonable cause to believe there has been a secondary boycott. App. to Pet. for Cert., p. 8, n. 9.

3. That a Section 10(1) injunction is the only effective remedy is adequately demonstrated by the substantial delays experienced when alternative routes are followed. An employer who is experiencing secondary pressures cannot withstand those pressures through the lengthy ordeal of investigation of the charge and issuance of a complaint, of the hearing before the Trial Examiner and a ruling upon his decision by the Board, and of finally enforcing the Board's order in a court of appeals. Through participation in the Board's procedures, Phillips and others have realized not only the costly delays but also their paralyzing economic effect upon the employer.

4. For example, more than 50% of the charges involving Section 10(1) that were filed in 1969 were filed by employers with less than 30 employees. *33rd Annual Report of the National Labor Relations Board (1968)*, Table 18, pp. 238-239.

B. The Present Case Arises in the Contexts of Other Significant Issues Which This Court Should Also Consider.

The present case is being submitted to the Court as part of a multi-faceted dispute raising numerous significant questions affecting the rights of charging parties generally. These questions are also recurrent and, for the reasons previously discussed, likely to continue to escape review by this Court. Phillips therefore concurs with the position of Terminal that the present case should be considered in conjunction with these related matters. Petitions for certiorari in these cases have recently been filed with this Court,[5] and to underscore the overall importance of this case, identical versions of the present brief are also being filed therein.

CONCLUSION.

For the aforegoing reasons, Phillips requests this Court to grant the instant petition for certiorari.

Respectfully submitted,

SEYFARTH, SHAW, FAIRWEATHER & GERALDSON,
111 West Jackson Boulevard,
Chicago, Illinois,

RALPH A. MORRIS,
Attorney for the Phillips Plumbing and Heating Company.

5. *Sears, Roebuck and Co.* v. *Solien*, No. .....; and *Terminal Freight Cooperative Association* v. *Solien*, No. .....

FILED
JAN 28 1972
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-924

SEARS, ROEBUCK AND CO., TERMINAL FREIGHT COOPERATIVE ASSOCIATION and TERMINAL FREIGHT HANDLING COMPANY, *Petitioners,*

v.

JOSEPH H. SOLIEN, Regional Director of the Fourteenth Region of the National Labor Relations Board, for and on behalf of the National Labor Relations Board, *Respondent.*

BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.

MILTON A. SMITH,
General Counsel,

OTTO F. WENZLER,
Labor Relations Counsel,
Chamber of Commerce of the United States of America,
1615 H Street, N. W.,
Washington, D. C. 20006,

BRICE I. BISHOP,
THOMAS CANAFAX, JR.,
Shimmel, Hill & Bishop,
1819 H Street, N.W.,
Washington, D. C. 20006,

Attorneys for the Chamber of Commerce of the United States of America.

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
I. Interest of the Amicus Curiae	1
II. Reasons for Granting the Writ	4
1. This Case Raises Serious Problems Concerning the Separation of Powers Between the Board and the General Counsel of the Board and Creates a Conflict Between Circuits	4
2. The Court Should Decide the Rights of a Charging Party to Participate in the Negotiations of an Administrative Settlement	7
Conclusion	9

AUTHORITIES CITED.

CASES:

Marine Engineers Beneficial Association v. *N.L.R.B.*, 202 F.2d 546, 549 (3rd Cir. 1953)	8
Poole Foundry & Machine Co. v. *N.L.R.B.*, 192 F.2d 740 (4th Cir. 1951)	7
Schriber-Schroth Co. v. *Cleveland Trust Co.*, 305 U.S. 47 (1938)	8
Sears, Roebuck and Co. v. *Carpet Layers, Local 419*, 397 U.S. 655	3
Silver King Co. v. *ConKling Mining Co.*, 256 U.S. 18 (1921)	8
Solien v. *Miscellaneous Drivers and Helpers Union, Local No. 610*, 440 F.2d 124 (8th Cir. 1970), No. 1588, October Term 1970, reh. denied November 15, 1971	3
Terminal Freight Handling Co. and Terminal Freight Cooperative Association v. *Joseph H. Solien*, 444, F.2d 699 (8th Cir. 1971), pet. for cert. pending in No. 71-609	2

Page

Terminal Freight Cooperative Association and Terminal Freight Handling Co. v. *Joseph H. Solien and Miscellaneous Drivers and Helpers Union No. 610. I.B.T.C.W. and H.A.*, No. 71-6150, 8th Cir., Sept. Term 1971; pet. for cert. pending in No. 71-925 3

Terminal Freight Cooperative Association v. *N.L.R.B.*, 447 F.2d 1099 (3rd Cir. 1971) 6

The Los Angeles Herald-Examiner v. *Kennedy*, 400 U.S. 3 (1970) 3

United Automobile Workers v. *Scofield*, 382 U.S. 205 (1965) 8

STATUTE:

Section 10(1) of the National Labor Relations Act, as amended, (61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 151, *et seq.*, 29 U.S.C. § 160(l) 2, 3, 4

MISCELLANEOUS:

93 Cong. Rec., 6442, 80th Cong. 1st Sess. (1947), 1 Leg. Hist. 883 5

93 Cong. Rec. 6383, 80th Cong. 1st Sess. (1947), 2 Leg. Hist. 1538 5

House Conference Report No. 510 on H.R. 3020, p. 37, 80th Cong. 1st Sess. (1947), 1 Leg. Hist. 541 5

118 Cong. Rec. 85, 101-102, 92nd Cong. 2nd Sess. (Jan. 19, 1972) 6

Thirty-Fourth Annual Report of the National Labor Relations Board for 1969 8

Thirty-Fifth Annual Report of the National Labor Relations Board for 1970 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-924

SEARS, ROEBUCK AND CO., TERMINAL FREIGHT COOPERATIVE ASSOCIATION and TERMINAL FREIGHT HANDLING COMPANY, *Petitioners,*

v.

JOSEPH H. SOLIEN, Regional Director of the Fourteenth Region of the National Labor Relations Board, for and on behalf of the National Labor Relations Board, *Respondent.*

BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.

I.

INTEREST OF THE AMICUS CURIAE.

This brief is filed on behalf of the Chamber of Commerce of the United States of America, a federation with a membership of over 3,700 state and local chambers of commerce and trade associations, an underlying membership of about five million business

firms and individuals, and a direct business membership in excess of 32,000.[1]

This case, together with two others currently pending before the Court on petitions for writs of certiorari, raise important questions of first impression regarding the interests of charging parties in proceedings under Section 10(1) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519; 29 U.S.C. § 151, *et seq.* hereafter referred to as "the Act"), 29 U.S.C. § 160(1), and in related administrative proceedings governing settlement agreements. Section 10(1) is the congressionally fashioned relief for the prevention of unlawful secondary boycotts. When Congress amended the Act in 1947 to outlaw secondary boycotts, it provided in Section 10(1) that the appropriate Regional Director of the Board be required to seek a preliminary injunction from the district court in those cases in which it was determined that there was reasonable cause to believe that a violation had occurred. This provision for preliminary relief was included in the Act to counteract the immediate and preemptory economic injury normally resulting from a secondary boycott.

The three cases currently before the Court, which arise out of the same transaction and involve interrelated aspects of Section 10(1) litigation are as they are commonly referred to, *Solien II*,[2] *Solien III* which

---

[1] This brief is filed with the written consent of all parties hereto pursuant to Supreme Court Rule 42(1).

[2] *Terminal Freight Handling Co. and Terminal Freight Cooperative Association* v. *Joseph H. Solien*, 444 F.2d 699 (8th Cir. 1971), pet. for cert. pending in No. 71-609.

is the instant case, and *Solien IV*.[3] *Solien II* raises the question of whether, despite the statutory requirement that the Regional Director "shall petition" the district court for injunctive relief upon a finding of reasonable cause, he nevertheless may decline to do so in favor of securing lesser or other relief through a settlement with the union. *Solien III*, the case here, involves three problems which intertwine with and directly concern Section 10(1) proceedings: whether the Board may supervise the conduct of settlement negotiations by the General Counsel of the Board (herein the "General Counsel"); whether the district courts may review an abuse of administrative discretion by the General Counsel; and whether the charging party should be allowed to participate in settlements in Board cases. *Solien IV* poses the closely related issue of what rights and status a charging party has in a Section 10(1) proceeding, particularly with respect to presenting objections to a stipulation proposed by the Regional Director as a basis for resolving the Section 10(1) court proceedings.[4]

These problems exemplify the unchartered area of procedure in Section 10(1) proceedings and in closely

---

[3] *Terminal Freight Cooperative Association and Terminal Freight Handling Co.* v. *Joseph H. Solien and Miscellaneous Drivers and Helpers Union No. 610, I.B.T.C.W. and H.A.*, No. 71-1650, 8th Cir., Sept. Term 1971; pet. for cert. pending in No. 71-925.

[4] In *Solien I, Solien* v. *Miscellaneous Drivers and Helpers Union, Local No. 610*, 440 F.2d 124 (8th Cir. 1971), the Court of Appeals held that the employer-charging party in a Section 10(1) proceeding did not enjoy the full status of a party-litigant. Certiorari was sought but denied on July 7, 1971 (No. 1588, October Term 1971, reh. denied November 15, 1971), although in two previous cases, the Court had granted certiorari on that issue, only to have the question become moot before it was decided. *Sears, Roebuck and Co.* v. *Carpet Layers, Local 419*, 397 U.S. 655; *The Los Angeles Herald Examiner* v. *Kennedy*, 400 U.S. 3 (1970).

related administrative proceedings before the General Counsel of the Board, with which the bar and the courts must contend. Because of the lack of authoritative guidance, conflicts and uncertainty have arisen weakening the effectiveness of Section 10(1) of the Act. As these questions center upon the employer's rights as the charging party, the Chamber and its members have a direct, vital interest therein, as representative of employers who must rely upon Section 10(1) as the only effective relief from precipitous injury from a secondary boycott. The Chamber has also filed briefs *amicus curiae* in *Solien II* and in *Solien IV*.

For these reasons the Chamber respectfully requests the Court to consider its views on the issues herein which are of serious national concern.

II.

REASONS FOR GRANTING THE WRIT.

1. This Case Raises Serious Problems Concerning the Separation of Powers Between the Board and the General Counsel of the Board and Creates a Conflict Between Circuits.

The Court below held that by failing to request Board review of the ruling of the General Counsel, the Petitioners failed to exhaust their administrative remedies and are barred from court review. However, such result fails to recognize that the Board has no authority to review those actions of the General Counsel which are performed in the exercise of his prosecutorial functions, and that consequently the courts are the only available forum to correct an abuse of discretion. Here, the General Counsel denied the Petitioners standing to participate in negotiations that led to the settlement of the case which had been filed

by the Petitioners. The court below misconceives the scope of the Board's authority to review settlement agreements: that authority is limited to considering the contents of the settlement and does not extend to reviewing the procedure employed in negotiating the agreement. Clearly, the procedure by which settlement agreements are arrived at is one of those matters which Congress committed to the General Counsel, independent of the Board's supervision.

Beyond question, the legislative history establishes that the separation of functions is fundamental to the proper administration of the Act. When the Congress revised the Act in 1947, it established the Office of the General Counsel to eliminate the evil of a single authority acting as prosecutor and judge. (See *e.g.* the remarks of Representative Hartley, 93 Cong. Rec. 6442, 80th Cong., 1st Sess. (1947), 1 Leg. Hist. 883; 93 Cong. Rec. 6383, 80th Cong., 1st Sess. (1947); 2 Leg. Hist. 1538). The intent was to confer upon the General Counsel complete independence of the Board in such matters, as is shown by the Conference Report:

> "The General Counsel . . . is to have the final authority to act in the name of, but independently of any direction, control, or review by, the Board in respect of the investigation of charges and the issuance of complaints of unfair labor practices, and in respect of the prosecution of such complaints before the Board."

House Conference Report No. 510 on H.R. 3020, p. 37, 80th Cong., 1st Sess. (1947), 1 Leg. Hist. 541.

Moreover, the fundamental importance of the separation of powers doctrine is demonstrated by the current debates over the enforcement powers of the Equal

Employment Opportunity Commission (herein the EEOC). One of the objections to giving the EEOC cease and desist powers such as those possessed by the Board was the unfairness in having the Commission both prosecute and judge cases before it. Consequently, the sponsors of the legislation accepted an amendment from the floor creating a division of functions between the Commission and its General Counsel. 118 Cong. Rec. 85, 101-102, 92nd Cong., 2nd Sess. (Jan. 19, 1972).

The decision below if allowed to stand would require the Board to establish a review procedure with respect to the actions of the General Counsel which are within his prosecutorial authority. Such overall supervision by the Board would erode the independence of the General Counsel and subvert the intent of Congress. Also, the decision is in direct conflict with the decision of the United States Court of Appeals for the Third Circuit in *Terminal Freight Cooperative Association* v. *N.L.R.B.*, 447 F.2d 1099 (1971). There the Third Circuit held that the actions of the General Counsel taken prior to the issuance of a complaint could not be reviewed by any tribunal. Although this extreme view disregards, among other matters, the role of the district court in correcting an abuse of discretion,[5] the conflict demonstrates the inherent mischief in allowing this matter to go unresolved.

---

[5] The authority of the district courts to review actions of the General Counsel is also raised by this case and the Chamber urges that the writ be granted for that reason also. The grounds for doing so are fully set forth in the Petition for Writ of Certiorari.

2. The Court Should Decide the Rights of a Charging Party To Participate in the Negotiations of An Administrative Settlement.

A determination of the rights of the charging party with respect to his participation in administrative settlement agreements is of paramount importance. There is no gainsaying that administrative settlements are crucial to the feasibility of administering the Act. The "manifest importance of . . . settlement agreements" was early recognized, such as in *Poole Foundry & Machine Co.* v. *N.L.R.B.*, 192 F.2d 740, 742 (4th Cir. 1951), where the court approved the following recommendation of Attorney General's Committee on Administrative Procedure (1941):

> "Probably over 90 per cent of the matters coming before administrative agencies are disposed of informally with the acquiescence of the private interest affected [6] and no formal trial proceedings. This must be so or government could not function * * *. The committee recommends that agencies which bring proceedings for the discontinuance of practices prohibited by law employ the informal methods used by the National Labor Relations Board, * * * to obtain in appropriate cases discontinuance by agreement without issuing complaints * * *."

In recent years about 90 per cent of all Board cases have been disposed of without formal adjudication. Approximately 80 per cent of all matters which the General Counsel believes to be meritorious are settled prior to a decision by the Board. *Thirty-Fifth Annual*

[6] The acquiescence of the private interest affected refers only to the respondent in a Board case, not to a charging party, for the General Counsel frequently closes cases based upon a unilateral settlement in which the charging party has not concurred.

Report of the National Labor Relations Board for 1970, pp. 1, 4; *Thirty-Fourth Annual Report of the National Labor Relations Board for 1969*, p. 1.

In view of the preeminence given to settlements in administering the Act, the rights of the parties in the procedures governing settlements are of the utmost concern. The charging party's interest in formal proceedings before the Board and the Courts has won recognition (*United Automobile Workers* v. *Scofield*, 382 U.S. 205 (1965)), as has his right to an evidentiary hearing on his objections to a settlement proposed by the Regional Director. *Marine Engineers Beneficial Association* v. *N.L.R.B.*, 202 F.2d 546, 549 (3rd Cir. 1953); *Leeds & Northrup* v. *N.L.R.B.*, 357 F.2d 527 (3rd Cir. 1966). However, of at least equal importance is the interest of the charging party in meaningful participation at the formative stages of settlement negotiations, including the right of being advised of the evidentiary basis upon which a settlement is contemplated. It is only thus that he may effectively project his views as to the remedial adequacy of the settlement, and in some degree affect his own destiny within the proceedings that he himself initiated and in which he has a vital concern.

Finally, we urge the Court to grant the writ of certiorari because there may well be no other occasion for review of these important questions. As settlements are of the most use to parties with limited means and as the legal avenues for obtaining review of settlement procedures are ill-defined, it is unlikely that parties will be inclined to bring the problems to the Court's attention. This ground alone is sufficient to warrant consideration of such important issues. See, *e.g. Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 305 U.S. 47 (1938). Cf., *Silver King Co.* v. *ConKling Mining Co.*, 256 U.S. 18 (1921).

III.

CONCULSION.

For the foregoing reasons the Chamber urges the Court to grant the petition for writ of certiorari.

Respectfully submitted,

MILTON A. SMITH,
General Counsel,

OTTO F. WENZLER,
Labor Relations Counsel,
Chamber of Commerce of the United States of America,
1615 H Street, N. W.,
Washington, D. C. 20006,

BRICE I. BISHOP,
THOMAS CANAFAX, JR.,
Shimmel, Hill & Bishop,
1819 H Street, N.W.,
Washington, D. C. 20006,

Attorneys for the Chamber of Commerce of the United States of America.